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Damned If You Do, Damned If You Don't? Employers' Challenges in Conducting Sexual Harassment Investigations

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DAMNED IF YOU DO, DAMNED IF YOU DON'T? EMPLOYERS' CHALLENGES IN CONDUCTING SEXUAL HARASSMENT INVESTIGATIONS

INTRODUCTION

Investigating sexual harassment claims can be a costly endeavor for employers.[1] And spending money does not always guarantee protection from the accuser *or* from the accused.[2]

In the fifteen years since the Supreme Court first recognized sexual harassment[3] as a violation of Title VII of the Civil Rights Act of 1964,[4] lower court decisions have further interpreted the statute and created a strong incentive for employers to combat harassment.[5] Courts have held that employers should establish effective anti-harassment policies,[6] investigate harassment complaints,[7] and punish the harassing employees.[8] In 1998, the Supreme Court revisited the issue of employer liability for

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1. *See, e.g.*, John Accola, *Coors Runs into a Minefield*, DENV. ROCKY MOUNTAIN NEWS, Mar. 28, 1999, at 1G. The company spent almost $600,000 investigating a single sexual harassment complaint and protecting the accuser. *See id.*

2. *See, e.g.*, John Accola, *Jury Orders Coors To Pay Fired Worker; Man Fights Accusation of Sexual Harassment*, DENV. ROCKY MOUNTAIN NEWS, Aug. 10, 1999, at 1B. A victim sued Coors for sexual harassment, and the accused sued for defamation and breach of contract. *See id.* The company settled with the victim for $200,000. *See id.* A federal jury ordered the company to pay $730,000 to the accused. *See id.*

3. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986) (holding that "hostile work environment" sexual harassment violates Title VII).

4. 42 U.S.C. § 2000e-2 (1994). Title VII prohibits discrimination on a variety of bases. *See id.* Specifically, it states:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Id. § 2000e-2(a)(1).

5. *See generally* Gary v. Long, 59 F.3d 1391, 1398 (D.C. Cir. 1995). The court found that the "employer [had] taken energetic measures to discourage sexual harassment in the workplace and [had] established, advertised, and enforced effective procedures to deal with it when it [did] occur . . . ." *Id.*

6. *See id.*

7. *See* Sparks v. Reg'l Med. Ctr. Bd., 792 F. Supp. 735 (N.D. Ala. 1992).

8. *See* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). "Employers should impose sufficient penalties to assure a workplace free from sexual harassment." *Id.* at 882.

sexual harassment[9] and established an affirmative defense for employers when the complaining employee has not suffered "tangible employment action."[10] This affirmative defense requires courts to look to the reasonableness of both the employer's and employee's conduct.[11] The reasonable care standard "generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment."[12]

One component of correcting harassment is investigating any complaints of harassment.[13] When investigating a complaint, the employer must balance the need to combat potential harassment with the rights of the accused.[14] Employers have faced defamation, invasion of privacy, intentional infliction of emotional distress, and wrongful termination actions, among others, filed by employees accused of harassment.[15] Now employers could face a new hurdle: potential liability for failure to comply with the Fair Credit Reporting Act (FCRA)[16] while conducting harassment investigations.[17]

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9. *See generally* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (advising lower courts to apply agency principles to determine if an employer is liable for a supervisor's harassment).

10. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998).

11. *See Faragher*, 524 U.S. at 805-07.

12. EEOC, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISOR (1999) [hereinafter 1999 EEOC GUIDANCE]. Discussion of the second prong of the defense, the employee's reasonable action, is beyond the scope of this Note.

13. *See* Jana Howard Carey, *Sexual Harassment Update*, *in* AVOIDING AND LITIGATING SEXUAL HARASSMENT CLAIMS 140, 141 (PLI Litig. & Admin. Practice Course Handbook Series No. 606, 1999). "Under *Ellerth* and *Faragher*, a prompt and thorough investigation of a sexual harassment complaint becomes even more critical to the employer's defense . . . ." *Id.*

14. *See* Sara Needleman Kline, Note, *Sexual Harassment, Wrongful Discharge and Employer Liability: The Employer's Dilemma*, 43 AM. U. L. REV. 191 (1993); *see also* Anthony J. Cincotta & David G. Uffelman, *The Fifth Element: Responding to a Sexual Harassment Allegation*, N.J. LAW., Apr. 1999, at 39. "The primary goal of the investigation should be to demonstrate and enforce the company's unequivocal commitment to eliminating sexual harassment . . ., without violating the rights of others in the process." *Id.* at 40.

15. *See* Nancy L. Abell & Marcia Nelson Jackson, *Sexual Harassment Investigations—Cues, Clues and How-To's*, 12 LAB. LAW. 17 (1996).

16. Fair Credit Reporting Act, 15 U.S.C. § 1681 (1994 & Supp. 1997).

17. *See generally* Barbara R. Rigo & Robert W. Pritchard, *Workplace Investigations*

In April 1999, the Federal Trade Commission (FTC) issued an opinion letter interpreting the FCRA as it relates to sexual harassment investigations.[18] In the letter, FTC Attorney Christopher Keller stated that the notice and other requirements of the FCRA apply when employers hire third parties to conduct sexual harassment investigations.[19] This means that an employer may need the accused's approval before beginning an investigation and must provide a copy of any resulting report to the accused before taking adverse action.[20] Although the FTC letter is merely advisory in nature,[21] courts could use it in interpreting the FCRA to limit an employer's ability to conduct prompt and effective investigations.[22]

Part I of this Note looks at an employer's need to investigate harassment claims to assert an affirmative defense, as well as what goes into an investigation. Part II focuses on the traditional challenges employers have faced in investigating harassment. Part III examines the Fair Credit Reporting Act and what it requires of employers. Finally, Part IV analyzes the employer's challenges in conducting investigations and outlines some options for employers.

I. WHY INVESTIGATE? AND HOW?

Even before the Supreme Court established an affirmative defense for employers, lower courts had frequently granted or upheld summary judgment for employers who actively prevented or eradicated any existing sexual harassment.[23] But

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Must Comply with Fair Credit Reporting Act, LEGAL INTELLIGENCER, Aug. 9, 1999, at 5.

18. *See* FTC Informal Opinion Letter from Christopher W. Keller, FTC Staff Attorney, to Judi A. Vail, Attorney (Apr. 5, 1999), *available at* http://www.ftc.gov/os/statutes/fcra/vail.htm [hereinafter Keller/Vail Letter].

19. *See id.*

20. *See id.*

21. *See* 16 C.F.R. pt. 600, App. § 621 (2000).

22. *See infra* Part IV.B.

23. *See* Farley v. Am. Cast Iron Pipe Co., 115 F.3d 1548 (11th Cir. 1997); Knabe v. Boury Corp., 114 F.3d 407 (3d Cir. 1997); Hirras v. Nat'l R.R. Passenger Corp., 95 F.3d 396 (5th Cir. 1996); Kilgore v. Thompson & Brock Mgmt., Inc., 93 F.3d 752 (11th Cir. 1996); Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995); Saxton v. AT&T, 10 F.3d 526 (7th Cir. 1993); Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989). *But see* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (reversing summary judgment because genuine issues remained concerning the employer's remedial action).

circuit courts disagreed about when to hold employers liable for harassment.[24] In *Meritor Savings Bank v. Vinson*, the Supreme Court told lower courts to look to agency principles to establish liability, but the lower courts differed in the application of those principles.[25]

In 1998, the Supreme Court looked beyond basic agency principles and held that an affirmative defense is available for employers if the employee has not suffered tangible job detriment.[26] The Court began by reviewing the agency principles applied by the various appellate courts.[27] The Court rejected the "scope of employment" analysis, stating that harassment is not within the scope of anyone's employment and does not further the interests of the employer.[28] Furthermore, the Court discounted the use of "apparent authority" analysis because in most cases it is the supervisor's actual (not apparent) authority that enables the harassment to occur.[29] The Court concluded that employer liability should be based on the "aided-by-agency-relation principle," which means that supervisors are able to harass employees in their capacity as agents of the employer.[30] Rather than allowing this agency analysis to establish strict liability in all cases (given that the agency

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24. *See* Louis P. DiLorenzo & Laura H. Harshbarger, *Employer Liability for Supervisor Harassment After* Ellerth *and* Faragher, 6 DUKE J. GENDER L. & POL'Y 3, 5 (1999); *see also* Hope A. Comisky, *"Prompt and Effective Remedial Action?" What Must an Employer Do To Avoid Liability for "Hostile Work Environmental" Sexual Harassment?*, 8 LAB. LAW. 181, 182-84 (1992) (reviewing the various standards used by lower courts after *Meritor*).

25. *See generally* Valerie H. Hunt, Faragher v. Boca Raton: *Employer Liability in Hostile Environment Sexual Harassment Cases—Ignorance Is No Longer Bliss*, 52 ARK. L. REV. 479 (1999).

26. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

27. In the years following *Meritor*, courts had few problems assigning liability to the employer in cases of quid pro quo harassment (in which the employee receives a tangible job benefit or suffers a tangible detriment by responding or not responding to harassment), but had more difficulty determining liability for hostile work environment claims. *See* DiLorenzo & Harshbarger, *supra* note 24, at 6-7. In fact, the Seventh Circuit's *Ellerth* decision resulted in eight different opinions. *See Ellerth*, 524 U.S. at 749.

28. *See Ellerth*, 524 U.S. at 756-57; *see also* DiLorenzo & Harshbarger, *supra* note 24, at 11.

29. *See Faragher*, 524 U.S. at 801-02; *Ellerth*, 524 U.S. at 759; *see also* DiLorenzo & Harshbarger, *supra* note 24, at 11.

30. *See Faragher*, 524 U.S. at 802; *Ellerth*, 524 U.S. at 762-63; *see also* DiLorenzo & Harshbarger, *supra* note 24, at 12.

relationship could reasonably "assist" all supervisors), the Court determined that when the employee has not suffered "tangible employment action," such as firing or not promoting, the employer can assert an affirmative defense.[31]

The affirmative defense is two-pronged—requiring reasonable action by the employer and unreasonable failure to act by the victim.[32] First, the defendant must show that the company acted reasonably to prevent harassment.[33] Second, the defendant must show that the victim unreasonably failed to take advantage of the reporting mechanisms available or otherwise unreasonably failed to avoid the harm.[34] To determine whether an employer took reasonable action to prevent and stop any harassment, courts typically look at the policies and procedures in place and how well the employer followed them.[35]

A. Preventing Harassment

While the Supreme Court noted that it has not required anti-harassment policies,[36] generally an employer must have an adequate policy in place to alert employees that harassment will not be tolerated.[37] The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing Title VII,[38] first identified the need for an appropriate anti-

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31. *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Tangible employment action could include "discharge, demotion, or undesirable reassignment." *Faragher*, 524 U.S. at 808.

32. *See Faragher*, 524 U.S. at 807.

33. *See id.* ("[E]mployer exercised reasonable care to prevent and correct promptly any sexually harassing behavior.").

34. *See id.* ("[P]laintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."). Reasonableness of the employee's actions is outside the scope of this Note, which focuses instead on the employer's actions.

35. *See* John P. Furfaro & Maury B. Josephson, *Update on* 'Ellerth' *and* 'Faragher,' N.Y. L.J., Sept. 3, 1999, at 3.

36. *See Faragher*, 524 U.S. at 807 ("[P]roof . . . [of] an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law [but] may appropriately be addressed in any case when litigating the first element of the defense.").

37. *See* Furfaro & Josephson, *supra* note 35, at 3.

38. The EEOC is responsible for enforcing Title VII. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986). Although the agency's interpretations are not binding, courts have relied on the EEOC's guidance. *See id.* (citing Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971)); *see also Faragher*, 524 U.S. at 800 (noting courts' application of EEOC rules).

harassment policy in 1990.[39] According to the EEOC's latest guidelines, a policy should be written clearly so employees can understand what conduct is prohibited.[40] The policy should also be posted in a conspicuous location and describe the complaint process, assuring the company's commitment to preventing workplace harassment.[41] In determining whether a policy is sufficient to meet the reasonable care standard, courts will look not merely at the policy's text, but also at whether the employees knew of the policy.[42] When the policy is not widely known or is not published in all workplaces, the employer's actions likely would not be reasonable.[43]

B. Acting to Stop Harassment

Beyond mere policy, the employer must also have effective procedures in place to allow employees to report harassment and to guide the employer in handling those reports.[44] Once an employer has effective policies and procedures in place, what does the employer do when an employee files a complaint? Courts have established a duty for employers to take "prompt and effective remedial action" designed to end harassment.[45] Generally, the employer should investigate the claims and take remedial action against the harasser based on the results of that

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39. *See* EEOC, NOTICE NO. N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (Mar. 19, 1990) [hereinafter 1990 EEOC GUIDANCE]. "An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented." *Id.*

40. *See* 1999 EEOC GUIDANCE, *supra* note 12.

41. *See id.*

42. *See* Montero v. AGCO Corp., 192 F.3d 856, 862 (9th Cir. 1999). "AGCO's policy and its efforts to ensure that all employees were aware of the policy establishes that AGCO exercised reasonable care to prevent sexual harassment in its workplaces." *Id.* (emphasis omitted).

43. *See Faragher*, 524 U.S. at 808. The Court noted that "[t]he District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees . . . ." *Id.*

44. *See* Furfaro & Josephson, *supra* note 35, at 3; *see also* Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) (holding that a policy alone is not enough to relieve liability).

45. *See* Donovan v. Big V Supermarkets, Inc., No. 98 Civ. 2842 (AGS), 1999 U.S. Dist. LEXIS 12516, at *21 (S.D.N.Y. Aug. 12, 1999).

investigation.[46] What is less clear, however, is what is meant by "prompt" and "effective." [47]

1. Timeliness of Response

Clearly if a company begins investigating the same day officials receive notice of the harassment, the response could be considered timely.[48] Courts have also found timely responses that begin within a few days[49] or within a few weeks of the complaint.[50]

It is not always appropriate to wait to investigate until an employee files a formal complaint.[51] For instance, in one case in which the investigation began the same day an employee filed a complaint, the court found that response was not timely.[52] Because the president of the company had seen the potentially harassing cartoon prior to the employee's report, the court found that the company actually delayed in responding to the harassment.[53]

2. Effectiveness of the Response

The effectiveness of the employer's response is generally measured retrospectively.[54] The question has been posed in two ways: whether the harassment stopped[55] or whether the response was reasonably calculated to end it.[56] Thus, employers

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46. *See, e.g.*, Farley v. Am. Cast Iron Pipe Co., 115 F.3d 1548 (11th Cir. 1997) (affirming summary judgment where employer immediately and thoroughly investigated, prepared a detailed report, and punished the accused harasser).

47. *See* Abell & Jackson, *supra* note 15, at 21.

48. *See, e.g.*, Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708 (2d Cir. 1996).

49. *See Donovan*, 1999 U.S. Dist. LEXIS 12516, at *23 (holding that a response within two days was timely).

50. *See* Johnson v. Wal-Mart Stores, Inc., 987 F. Supp. 1376, 1382 (M.D. Ala. 1997); Carrero v. N.Y. City Hous. Auth., 668 F. Supp. 196, 199 (S.D.N.Y. 1987), *rev'd in part on other grounds*, 890 F.2d 69 (2d Cir. 1989). *But see* Cadena v. Pacesetter Corp., 18 F. Supp. 2d 1220, 1230-31 (D. Kan. 1998) (holding a two-week delay was not prompt).

51. *See* Bennett v. Corroon & Black Corp., 845 F.2d 104 (5th Cir. 1988); Abell & Jackson, *supra* note 15, at 22.

52. *See Bennett*, 845 F.2d at 106.

53. *See id.*

54. *See* Kline, *supra* note 14, at 208.

55. *See* Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991).

56. *See* Kilgore v. Thompson & Brock Mgmt., Inc., 93 F.3d 752, 754 (11th Cir. 1996) (holding remedies must only be "reasonably likely to prevent the misconduct from recurring") (citing Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990)); *see*

have been found liable if the harassment ceased without any action by the employer[57] or if the action they took failed to stop the harassment.[58] On the other hand, employers could be precluded from liability when effective actions are taken.[59]

While courts have found that firing the harassing employee is an effective response,[60] they do not require that level of punishment.[61] The level of discipline should relate to the severity of the harassment.[62] In some cases, suspension will be sufficient.[63] Other times, employers must remove the harassing employee from the victim's work environment by transferring the harasser or changing work schedules.[64]

C. Practical Considerations in Sexual Harassment Investigations

According to EEOC guidelines, timeliness and fairness are keys to a successful harassment investigation.[65] While some large corporations can conduct prompt and fair investigations using internal resources, many companies rely on outside parties to conduct investigations.[66] In determining who should

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also Parkins v. Civ. Constructors of Ill., Inc., 163 F.3d 1027, 1036 (7th Cir. 1998) (holding that the defendant employer successfully stopped the harassment with quick and decisive action).

57. *See* Fuller v. City of Oakland, 47 F.3d 1522, 1528-29 (9th Cir. 1995).

58. *See* Mockler v. Multnomah County, 140 F.3d 808, 814 (9th Cir. 1998).

59. *See* Knabe v. Boury Corp., 114 F.3d 407, 413-14 (3d Cir. 1997); *Kilgore*, 93 F.3d at 754.

60. *See* Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708 (2d Cir. 1996).

61. *See* Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991). "An employer's remedy should persuade individual harassers to discontinue unlawful conduct. We do not think that all harassment warrants dismissal...." *Id.* (citing Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 427 (8th Cir. 1984)).

62. *See Mockler*, 140 F.3d at 813. In some cases, even oral warnings can be sufficient if the harassment ends. *See* Sparks v. Reg'l Med. Ctr. Bd., 792 F. Supp. 735 (N.D. Ala. 1992). *But see Ellison*, 924 F.2d at 882. "Title VII requires more than a mere request to refrain from discriminatory conduct." *Id.*

63. *See* Juarez v. Ameritech Mobile Comm., Inc., 957 F.2d 317 (7th Cir. 1992) (holding employer not liable and response effective when employee was suspended, without pay, for a week).

64. *See Sparks*, 792 F. Supp. at 747.

65. *See* 1999 EEOC GUIDANCE, *supra* note 12, at V(c)(1)(e).

66. *See* Cincotta & Uffelman, *supra* note 14, at 41; *see also Workplace Harassment Investigations Affected by Consumer Protection Laws*, 35 Fair Emp. Prac. (BNA) No. 873, at 63 (May 27, 1999) [hereinafter *Workplace Harassment*] (alerting corporations to problems involving the FCRA and hiring investigators).

conduct the investigation, employers should select someone who "will objectively gather and consider the relevant facts."[67]

1. Potential Problems with In-House Investigations

If a company is large enough and has sufficient resources, an in-house investigation may be one way to ensure a quick response to harassment allegations.[68] If inside resources do not have the training necessary "to conduct a prompt, thorough and fair investigation," however, the employer should look elsewhere for an investigator.[69] Even companies large enough to maintain sufficient, well-trained, in-house staff may need outside investigators if the accused is an officer of the company or other high-ranking executive.[70]

2. Potential Problems with Using Attorneys or Other Outside Parties

Hiring an outside investigator or using outside counsel to conduct investigations could alleviate some problems presented by in-house investigations.[71] Having a properly trained, impartial investigator conduct the investigation could lead employees to put more faith in the fairness and confidentiality of the process.[72] Although using outside counsel could be helpful in this regard, it raises a variety of additional concerns.[73] If a suit reaches the courts, the investigator could be called to testify; if needed to testify, the attorney would be precluded

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67. 1999 EEOC GUIDANCE, *supra* note 12, at V(c)(1)(e).

68. *See* Linda M. Edwards & Cheryl L. Kopitzke, *Ensuring a Fair and Proper Sexual Harassment Investigation: Just How Precarious Is the Tightrope an Employer Must Walk?*, 20 L.A. LAW. 24 (1997).

69. Cincotta & Uffelman, *supra* note 14, at 41.

70. *See* Greenebaum Doll & McDonald PLLC, *Investigating Harassment Complaints*, KY. EMP. L. NEWSL., Oct. 1999.

71. *See, e.g.*, KENNETH L. SOVEREIGN, PERSONNEL LAW 100 (4th ed. 1999). For instance, using outside investigators "makes [the investigation] more impartial." *Id.*

72. *See* D. Jan Duffy, Challenging Legal Issues Involving Sexual Harassment Investigations: The New Importance of Conducting Investigations Properly, Presentation to ABA Section of Labor & Employment Law, Employee Rights & Responsibilities Committee Mid-Winter Meeting (March 18-21, 1998) (on file with the *Georgia State University Law Review*).

73. *See generally* Michael Starr & Jordan Lippner, *Harassment*, NAT'L L.J., June 21, 1999, at B5 (discussing problems for attorneys conducting harassment investigations).

from representing the employer in any related litigation.[74] Additionally, there could be a conflict between the attorney's role as counselor and advisor (e.g., attorney-client privilege and work product protections) and his position as investigator.[75] For instance, if the employer is able to assert the affirmative defense, the privilege and work product conflicts would arise when the investigator's report is needed as evidence of "reasonable response."[76]

II. TRADITIONAL CHALLENGES TO EMPLOYEE INVESTIGATIONS

Employers faced with a need to investigate and take action against alleged harassers may face potential litigation from both the accused and the accuser.[77] Traditionally, many of these challenges have been based in wrongful termination, defamation, intentional infliction of emotional distress, or invasion of privacy actions.[78]

A. Wrongful Termination Claims

When investigations lead employers to conclude that harassment was sufficiently severe, employers have discharged the accused employees.[79] In cases involving a contract requiring "just cause" for dismissal, employees have challenged the

74. *See* Cincotta & Uffelman, *supra* note 14, at 41. "[The] investigator should be someone other than the person from whom the company will seek legal advice in connection with the investigation, or from whom the employer will seek representation in the event of litigation." *Id.*

75. *See* Carey, *supra* note 13, at 144-54. A full discussion of the attorney-client privilege, work product, and professional responsibility considerations involved in harassment investigations is beyond the scope of this Note.

76. *See id.* at 144. "[A] corporation may need to disclose at least some of the documentation of its investigation in order to establish that a reasonable investigation took place." *Id.*

77. *See, e.g.*, Accola, *supra* note 1; Accola, *supra* note 2.

78. *See* Vice v. Conoco, Inc., 150 F.3d 1286 (10th Cir. 1998) (wrongful termination); Freeman v. Bechtel Constr. Co., 87 F.3d 1029 (8th Cir. 1996) (infliction of emotional distress); Rattray v. City of Nat'l City, 51 F.3d 793 (9th Cir. 1994) (invasion of privacy); Vickers v. Abbott Lab., 719 N.E.2d 1101 (Ill. App. 1999) (defamation and breach of contract). Employers in union environments also face potential challenges through the union grievance process. *See, e.g.*, Westvaco Corp. v. United Paperworkers Int'l Union, 171 F.3d 971 (4th Cir. 1999) (reinstating arbitral award requiring employer to suspend employee rather than fire him for violating company's sexual harassment policy).

79. *See* Tischmann v. ITT/Sheraton Corp., 882 F. Supp. 1358 (S.D.N.Y. 1995).

discharge based on breach of contract.[80] When there is no express contract, however, employees have attempted to fight their dismissal based on claims of wrongful termination or wrongful discharge.[81]

1. Effect of At-Will Employment

Often, the issue of wrongful termination does not reach the jury.[82] At-will employment protects the employer by allowing termination for any reason or no reason.[83] In states that strictly follow the at-will doctrine, such as Georgia, the employer does not have to justify any discipline or termination based on a sexual harassment investigation.[84] In many states recognizing at-will employment, courts have been reluctant to imply a contract based on employment handbooks or promises from the employer.[85] Some courts have also determined that good faith and fair dealing requirements will not be read into the employment relationship.[86]

2. Effect of a Just Cause Requirement

When employees have a contractual right not to be discharged without just cause—either through an express contractual provision or through an implied exception to the doctrine of employment at will—the courts take different views on how to determine if the cause was just or good.[87] California's supreme court recently recognized that the employer determines good or just cause. In *Cotran v. Rollins Hudig Hall International*,[88] the

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80. *See* Rice v. Cmty. Health Assoc., 40 F. Supp. 2d 788 (S.D.W.V. 1999); *see also* Scherer v. Rockwell Int'l Corp., 975 F.2d 356 (7th Cir. 1992) (alleging breach of contract claim due to dismissal for sexual harassment).

81. *See, e.g.*, Cotran v. Rollins Hudig Hall Int'l Inc., 948 P.2d 412 (Cal. 1998).

82. *See Vice*, 150 F.3d 1286 (affirming summary judgment for the employer).

83. *See id.* at 1288.

84. *See, e.g.*, *Tischmann*, 882 F. Supp. at 1367.

85. *See* Manning v. Cigna Corp., 807 F. Supp. 889 (D. Conn. 1991). *But see* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980).

86. *See* Kerrigan v. Britches of Georgetowne, Inc., 705 A.2d 624 (D.C. 1997).

87. *Compare* Cotran v. Rollins Hudig Hall Int'l, Inc., 948 P.2d 412 (Cal. 1998), *and* Kestenbaum v. Pennzoil Co., 766 P.2d 280 (N.M. 1988) (both requiring jury to apply standard to determine reasonableness of employer's action or good cause), *with Toussaint*, 292 N.W.2d 880 (requiring jury to review facts to determine if employee did what employer alleges).

88. 948 P.2d 413 (Cal. 1998).

court upheld the appellate court ruling that overturned a $1.78 million verdict for the employee.[89] The trial court had held that, when good cause is required, the jury should perform a de novo review of the company's reasons for terminating an employee.[90] This holding would have required the employer to defend its actions by proving the alleged misconduct actually occurred.[91] The California Supreme Court, however, held that the employer needs some leeway in determining what is good cause for employee dismissal.[92] "[T]he jury's role is to assess the objective reasonableness of the employer's factual determination."[93]

Leaving just cause or good cause in the employer's hands does not encourage employers to perform cursory investigations or to dismiss employees for capricious reasons.[94] The employer still must prove that the company had a reasonable basis for the decision.[95] In fact, allowing the jury to second-guess the employer's action would be more likely to discourage proper responses to harassment complaints.[96] In providing guidance to lower courts, the California Supreme Court further defined a good faith reason as "[a] reasoned conclusion . . . supported by substantial evidence gathered through an adequate investigation . . . ."[97]

At least one state requires the jury to review the employer's actions de novo. In *Toussaint v. Blue Cross & Blue Shield of*

89. *See id.* at 414.

90. *See id.* at 416.

91. *See id.* "[T]he trial judge remarked, the case was nothing more than 'a contract dispute' and it was Rollins' burden to prove plaintiff committed the acts that led to his dismissal . . . ." *Id.* (emphasis omitted).

92. *See id.* at 419. The court relied on similar decisions in Oregon, Nevada, Washington, and New Mexico. *See id.* at 419-20.

93. *Id.* at 419; *see also* Silva v. Lucky Stores, Inc., 76 Cal. Rptr. 2d 382, 385 (Cal. Ct. App. 1998). The employer must show it treated the employee fairly and reasonably believed the harassment occurred. *See id.* (interpreting the *Cotran* decision).

94. *See Cotran*, 948 P.2d at 420.

95. *See id.* The court followed the New Mexico Supreme Court's decision in *Kestenbaum v. Pennzoil*, 766 P.2d 280 (N.M. 1988). The *Kestenbaum* court upheld a verdict for the plaintiff because "there was substantial evidence to support the jury finding that Pennzoil did not act upon reasonable grounds." *Id.* at 288.

96. *See Cotran*, 948 P.2d at 420. "[A] standard permitting juries to reexamine the factual basis for the decision to terminate for misconduct—typically gathered under the exigencies of the workaday world and without the benefit of the slow-moving machinery of a contested trial—dampens an employer's willingness to act . . . ." *Id.*

97. *Id.* at 422.

Michigan,[98] the Michigan Supreme Court held that in cases of dismissal based on "specific misconduct . . . the question is one of fact for the jury: did the employee do what the employer said he did?"[99] The court said dismissal for good cause requires more than just an employer's good faith or reasonable belief.[100]

Only one state has codified a good or just cause requirement.[101] In 1987, Montana legislators enacted the Wrongful Discharge from Employment Act.[102] Under the Act, employers may not terminate employees without good cause if the employee has completed the probationary period established by the employer.[103] Employers can also be liable for terminating an employee in a manner inconsistent with their own written personnel policies.[104] Montana's statute defines good cause as "reasonable job-related grounds . . . based on failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason."[105] Employees can recover lost wages and benefits,[106] and punitive damages are available in limited cases.[107] Employees may not recover pain and suffering, compensatory damages, or other damages based on any other legal theory.[108]

The Montana courts have not directly applied the Wrongful Discharge Act in the sexual harassment context.[109] In *Koepplin*

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98. 292 N.W.2d 880 (Mich. 1980). Although *Toussaint* did not involve sexual harassment, the rule created would also apply if the employee were dismissed based on such allegations.

99. *Id.* at 896. "The jury is always permitted to determine the employer's true reason for discharging the employee." *Id.*

100. *See id.*

101. *See* MONT. CODE ANN. §§ 39-2-901 to -914 (1998); *see also* Marc Jarsulic, *Protecting Workers from Wrongful Discharge: Montana's Experience with Tort and Statutory Regimes*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 105, 105-06 (1999).

102. *See* MONT. CODE ANN. § 39-2-901 (1998). The statute only applies to employees not covered by a collective bargaining agreement or written contract. *See id.* § 39-2-912(2).

103. *See id.* § 39-2-904(2).

104. *See id.* § 39-2-904(3).

105. *Id.* § 39-2-903(5).

106. *See id.* § 39-2-905(1).

107. *See id.* § 39-2-905(2). Based on public policy concerns, punitive damages are allowed only when an employee proves actual malice or fraud on the part of the employer. *See id.*

108. *See id.* § 39-2-905(3).

109. A search of Westlaw in October 2000 revealed seventy-eight Montana Supreme Court cases dealing with the Wrongful Discharge Act. *See, e.g.*, Burkhart v. Semitool, Inc., 5 P.3d 1031 (Mont. 2000); Dahl v. Fred Meyer, Inc., 993 P.2d 6 (Mont. 1999).

v. Zortman Mining, the state supreme court reviewed the case of an employee discharged after threatening individuals during a sexual harassment investigation.[110] The court upheld summary judgment for the employer based on the disruptive nature of the employee's actions.[111]

B. Tort Claims

Accused harassers have also brought suit against their employers (generally *former* employers) based on traditional tort claims of defamation, intentional infliction of emotional distress, or invasion of privacy.[112] However, many employers have been successful on summary judgment motions based on qualified privilege.[113]

1. Defamation

To state a claim for defamation, the employee must show "(1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages."[114] Because harassment investigations arise in the employment context, the employer generally can assert a qualified privilege related to intracorporate communications or common interest.[115] Thus, unless the employee can prove that the employer acted with

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Narrowing the search by adding the term "sexual harassment" yielded only two cases: *Fandrich v. Capital Ford Lincoln Mercury*, 901 P.2d 112 (Mont. 1995) (addressing plaintiff's claims for wrongful discharge and sexual harassment), and *Koepplin v. Zortman Mining Inc.*, 881 P.2d 1306 (Mont. 1994).

110. *See Koepplin*, 881 P.2d at 1306.

111. *See id.* at 1311. The court held that Koepplin's threats to company managers were "at least insubordination which justified immediate termination . . . ." *Id.* The district court had called the threats "shocking and outrageous." *Id.* at 1310.

112. *See* Rattray v. City of Nat'l City, 51 F.3d 793 (9th Cir. 1994) (invasion of privacy); Nance v. M.D. Health Plan, Inc., 47 F. Supp. 2d 276 (D. Conn. 1999) (intentional infliction of emotional distress); Simpson v. Mars, Inc., 929 P.2d 966 (Nev. 1997) (defamation); Bell v. Evening Post Publ'g Co., 459 S.E.2d 315 (S.C. App. 1995) (defamation).

113. *See, e.g.*, Alade v. Borg-Warner Protective Serv. Corp., 28 F. Supp. 2d 655 (D.D.C. 1998).

114. *Simpson*, 929 P.2d at 967; *see also* RESTATEMENT (SECOND) OF TORTS § 558 (1965).

115. *See, e.g.*, Duffy v. Leading Edge Prod., Inc., 44 F.3d 308 (5th Cir. 1995).

malice or published the statement to unrelated parties, the claim will fail.[116]

If the investigators only discuss allegations with employees who need to know and are involved in the investigation, courts will likely recognize a privilege.[117] In *Alade v. Borg-Warner Protective Services Corp.*,[118] even though the employer mentioned the harassment investigation and the employees' termination in a department meeting, the privilege survived.[119] The court in *Alade* held that sharing the information with other employees furthered the goal of preventing future harassment by demonstrating the severe consequences of violating the company's policies.[120] The primary purpose of the communication was to protect the company's interests; therefore, even if there had been ill-will behind the comments, they would still be protected.[121]

Not all courts are willing to grant summary judgment to employers based on the qualified privilege.[122] The Nevada Supreme Court has held that publication between individuals within a corporation is sufficient to establish a prima facie case of defamation.[123] "[T]he law of defamation is meant to provide an incentive for people not to spread lies that can injure others . . . . [T]o allow an employer to circulate lies around the workplace with impunity is particularly damaging."[124] According to that court, the employer must raise the privilege as a defense in the case, rather than relying on the court to grant summary judgment.[125]

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116. *See id.* at 315-16.

117. *See Bell*, 459 S.E.2d at 317. *But see* Ekokotu v. Pizza Hut, Inc., 422 S.E.2d 903 (Ga. Ct. App. 1992). Under Georgia law, intracorporate publication is not a qualified privilege; rather, such communication does not constitute a "publication" for purposes of a defamation claim. *See id.* at 904.

118. 28 F. Supp. 2d 655 (D.D.C. 1998).

119. *See id.* at 657.

120. *See id.*

121. *See id.* This reasoning also supports the goals of Title VII—to prevent discrimination rather than merely provide redress. *See* 1999 EEOC GUIDELINES, *supra* note 12, at V(c)(1).

122. *See* Simpson v. Mars, Inc., 929 P.2d 966, 968 (Nev. 1997).

123. *See id.*

124. *Id.*

125. *See id.*

2. Infliction of Emotional Distress

Courts have been unwilling to allow plaintiffs to claim infliction of emotional distress or other torts when the plaintiff is attempting to circumvent the at-will employment rules.[126] In *Tischmann v. ITT/Sheraton Corp.*,[127] the owner of a New York hotel removed the general manager from his position following an investigation into sexual harassment charges.[128] He filed suit based in part on contract claims which the court dismissed because the contract was no longer in force.[129] Additionally, Tischmann sought to hold the employer to a good faith standard which the court denied based on the at-will employment rules in New York.[130] Finally, he sought to hold the employer liable for negligent and intentional infliction of emotional distress caused by the termination.[131] The court found that the employee's claims were just an effort to circumvent the at-will rule and, as such, would not survive summary judgment.[132]

Courts have also held that sexual harassment investigations generally do not rise to the level of outrage needed to support emotional distress claims.[133] However, at least one court was willing to look more closely at the details of the investigation.[134] For instance, the district court in Connecticut recently refused to dismiss the emotional distress claims related to a same-sex sexual harassment claim.[135]

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126. *See* Tischmann v. ITT/Sheraton Corp., 882 F. Supp. 1358, 1367 (S.D.N.Y. 1995); *see also* Vice v. Conoco, Inc., 150 F.3d 1286, 1292 (10th Cir. 1998) (holding that plaintiff's claims of fraudulent misrepresentation and negligent investigation were equivalent to wrongful discharge claim which was not cognizable under Oklahoma's at-will employment rule).

127. 882 F. Supp. 1358 (S.D.N.Y. 1995).

128. *See id.* at 1363.

129. *See id.* at 1366-67. Plaintiff's amended complaint included eleven causes of action. *See id.* at 1364.

130. *See id.* at 1366-67; *see also supra* Part II.A.

131. *See Tischmann*, 882 F. Supp. at 1364.

132. *See id.* at 1367.

133. *See* Twine v. Dickson, No. 3:97-CV-2268-G, 1999 U.S. Dist. LEXIS 216, at *2 (N.D. Tex. Jan. 5, 1999). To establish a claim of intentional infliction of emotional distress, conduct must be "beyond all reasonable grounds of decency." *Id.* at *21 (quoting Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993)); *see also* RESTATEMENT (SECOND) OF TORTS § 46 (1965) (stating elements of intentional infliction of emotional distress).

134. *See* Nance v. M.D. Health Plan, Inc., 47 F. Supp. 2d 276 (D. Conn. 1999).

135. *See id.* "An employer's questioning that signals to others its belief that the subject employee is a homosexual in reckless disregard of a foreseeable, unsavory response by

3. Invasion of Privacy

Employers are generally protected from invasion of privacy claims in most office investigations—the standard is based on the level of privacy employees would normally expect.[133] However, employers can overstep the boundaries in conducting investigations. In *Rattray v. City of National City*,[137] a police department investigated harassment complaints against an officer by secretly taping conversations between the accused and the alleged victim.[138] The court found that the police chief's action may have invaded the employee's privacy.[139] Even though police officers enjoy a privilege from liability for invasion of privacy when taping conversations in criminal investigations, that privilege is not available when performing internal harassment investigations.[140]

III. FAIR CREDIT REPORTING ACT

Tort and contract claims are not the only potential challenges from an accused employee in workplace harassment investigations. According to a recent Federal Trade Commission opinion letter, employers must also comply with the Fair Credit Reporting Act in conducting investigations.[141] Failure to comply with the FCRA can lead to fines from the FTC[142] or a suit from the employee involved.[143]

Congress initially enacted the FCRA in 1968 to protect individuals from incorrect or inaccurate credit reporting or from

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those persons thus informed, could constitute extreme and outrageous conduct" to support a claim of intentional infliction of emotional distress. *Id.* at 279. *But see* Malik v. Carrier Corp., 202 F.3d 97 (2d Cir. 2000) (holding employer not liable for negligent infliction of emotional distress related to a sexual harassment investigation).

136. *See* LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON, P.C., FUNDAMENTALS OF EMPLOYMENT LAW 150-51 (1994). For instance, if an employer's policy allows it to search offices or review e-mail, employees should expect that the employer could enforce those policies. *See id.*; *see also* WILLIAM S. HUBBARTT, THE NEW BATTLE OVER WORKPLACE PRIVACY 208-09 (1998) (discussing employees' expectations of privacy).

137. 51 F.3d 793 (9th Cir. 1994).

138. *See id.* at 796.

139. *See id.* at 799 (reversing dismissal of the invasion of privacy claim).

140. *See id.* at 797-98.

141. *See* Keller/Vail Letter, *supra* note 18.

142. *See* 15 U.S.C. §§ 1681q-1681r (1994 & Supp. 1999).

143. *See id.* § 1681n.

unfair use of such reports.[144] Not only are such reports used to determine qualification for mortgages or other financial transactions, employers increasingly rely on them in making hiring, firing, and promotion decisions.[145] In 1996, Congress revised the FCRA by enacting the Consumer Credit Reform Act.[146] Prior to the 1996 Act, although the FCRA applied in the employment context,[147] employers faced only minimal restrictions in accessing and using credit reports.[148] The revised FCRA, with the 1996 changes, imposes significant procedural restrictions on employers' access to and use of credit reports for employment purposes.[149]

A. The 1996 Amendments to the FCRA

Since September 30, 1997, employers must obtain written permission from an employee or potential employee prior to receiving a copy of that individual's credit report.[150] The notice is specifically prescribed in the statute.[151] It must be in writing, in a separate document that only includes FCRA disclosures.[152] The employee must acknowledge the notice and sign an authorization allowing the employer to request a credit report.[153] The employer is also responsible for certifying to the credit

144. *See id.* § 1681; *see also* Carole Basri, *Fair Credit Reporting and Sexual Harassment*, N.Y. L.J., July 1, 1999, at 5.

145. *See* Marc L. Silverman, *Employers Seeking Credit Reports, Beware!*, N.Y. L.J. CORP. COUNS., Feb. 9, 1998, at S5.

146. Consumer Credit Reform Act, Pub. L. No. 104-208, 110 Stat. 428 (1996) (codified as amended at 15 U.S.C. § 1681a-t (Supp. 1999)); *see* Carol A. Ahern & Jeffrey P. Taft, *The Consumer Credit Reporting Reform Act of 1996: An Attempt To Make the Fair Credit Reporting Act More Fair*, 51 CONSUMER FIN. L.Q. REP. 304 (1997).

147. *See* Wiggins v. Dist. Cablevision, Inc., 853 F. Supp. 484 (D.D.C. 1994). "One of the central purposes of the FCRA is to protect an individual from inaccurate information in a consumer report used as a factor in determining the individual's eligibility for employment." *Id.* at 489.

148. *See* Lynne B. Barr & Barbara J. Ellis, *The New FCRA: An Assessment of the First Year*, 54 BUS. LAW. 1343 (1999). For example, the old FCRA did not require advance notice to or authorization from employees. *See id.*

149. *See* 15 U.S.C. §§ 1681g-1681h; *see also* Silverman, *supra* note 145, at S5 (explaining FCRA amendments and the impact on employers).

150. *See* 15 U.S.C. § 1681b(b)(2).

151. *See id.* § 1681b(b)(2)(A).

152. *See id.*

153. *See id.* § 1681b(b)(2)(B). Authorization may be made on the disclosure form. *See id.*

reporting agency that such notice was given and permission received.[154]

Additionally, if the employer uses the report in "an adverse employment action" (e.g., firing, not hiring, not promoting, etc.), the employee is entitled to receive a copy of the report and notification of his rights prior to the action.[155] The pre-adverse action notification provides an opportunity for the employee to rebut the charges.[156] When taking adverse action, the employer must provide a notice of the action, disclose information on the agency providing the report, and inform the employee that the reporting agency did not make the decision to take the adverse action.[157] Overall, these new provisions provide more protection for employees by alerting them to the potential use of a credit report for any employment purpose.[158]

B. The Basics of the FCRA

1. What Is a Consumer Credit Report?

The FCRA requirements apply to use of "consumer reports" and "investigative consumer reports."[159] A consumer report is the usual report requested to determine an individual's credit worthiness.[160] Among other things, a consumer report can include credit histories, driving records, or criminal background checks.[161]

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154. *See id.* § 1681b(b)(1)(A)(i).

155. *See id.* § 1681b(b)(3). This notification is required even if the adverse action is only partially based on the report. *See id.* The rights notification is also prescribed in the FCRA. *See id.* § 1681g(c).

156. *See generally* Barr & Ellis, *supra* note 148, at 1348. The statute does not set a minimum time to wait between notifying the employee and taking adverse action. *See id.*

157. *See* 15 U.S.C. § 1681m(a); Basri, *supra* note 144, at 5.

158. *See* Silverman, *supra* note 145, at S5; *see also* FTC Opinion Letter from William Haynes, FTC Staff Attorney, to Frank S. James, III, Attorney (Aug. 5, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/james.htm [hereinafter Haynes/James Letter] (interpreting § 604(b)(2) and explaining its purpose).

159. 15 U.S.C. §§ 1681b-1681d (Supp. 1999); *see also* Teresa L. Butler, *The FCRA and Workplace Investigations*, 15 LAB. LAW. 391, 392 (2000) (noting the Act applies to reports that contain no credit information).

160. *See* 15 U.S.C. § 1681a(d). "The term 'consumer report' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living . . . ." *Id.*

161. *See How Does the FCRA Really Affect Your Investigations?*, SEC. DIR. REP.,

The disclosure requirements are slightly more stringent for users of investigative consumer reports.[162] These are consumer reports regarding a person's character and reputation "in which information . . . is obtained through personal interviews with neighbors, friends, or associates . . . ."[163] This is the type of report most likely used in any workplace investigation.[164] In addition to the usual requirements for users of consumer reports, employers using investigative reports must provide more detailed disclosures regarding the type of information being sought.[165] Employers must separately disclose to the employee that they have requested an investigative consumer report within three days of initiating the investigation.[166] This disclosure must also alert the employee of his right to request a "complete and accurate disclosure of the nature and scope of the investigation requested."[167]

2. What Is a Permissible Purpose?

The FCRA allows use of credit reports for a "permissible purpose."[168] In the business context, this includes employment uses and "other legitimate business needs."[169] Employment purposes include hiring, firing, and promotion of employees.[170] However, the FCRA restricts an employer to using credit reports only for employees and prospective employees who have given the requisite permission.[171]

An employer violates the FCRA by requesting credit reports on former employees. In *Russell v. Shelter Financial Services*,[172]

May 1999, at 6.

162. *Compare* 15 U.S.C. § 1681b *with* 15 U.S.C. § 1681d.

163. 15 U.S.C. § 1681a(e).

164. *See* Rigo & Pritchard, *supra* note 17, at 4; *see also* Keller/Vail Letter, *supra* note 18. *But see* Butler, *supra* note 159, at 395. "Arguably, workplace investigations of specific allegations regarding workplace misconduct do not entail an inquiry into an individual's *general* character, reputation, personal characteristics, or mode of living as contemplated by the Act." *Id.* (emphasis added).

165. *See* 15 U.S.C. § 1681d(a)-(b).

166. *See id.* § 1681d(a)(1)(A).

167. *Id.* § 1681d(b).

168. *Id.* § 1681b(a).

169. *Id.*

170. *See id.* § 1681a(h).

171. *See* Jones v. Federated Fin. Reserve Corp., 144 F.3d 961 (6th Cir. 1998) (holding employer liable for employee's unauthorized access of co-worker's consumer report).

172. 604 F. Supp. 201 (W.D. Mo. 1984).

the employer requested the plaintiff's consumer report as part of an internal investigation of embezzlement.[173] The problem, according to the court, was that the employee resigned before the company requested the report.[174] Therefore, the report could not be used for any of the employment purposes allowed by the statute.[175]

3. What Is a Credit Reporting Agency?

The FCRA restrictions apply when employers hire credit reporting agencies to compile and analyze data on employees.[176] The statute defines a credit reporting agency as "any person [who] . . . regularly engages . . . in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties . . . ."[177]

One recent case held that an accounting firm and a law firm did not qualify as consumer reporting agencies under the FCRA.[178] In *Friend v. Ancillia Systems, Inc.*, the employer fired its chief financial officer for breach of fiduciary duty and breach of his employment contract.[179] Friend alleged that the company's decision was based on investigations by its attorneys (Stetler & Duffy) and an accounting firm (Ernst & Young).[180] The court held that neither firm was a credit reporting agency under the FCRA.[181] The court based the decision on Friend's failure to produce evidence that "Stetler & Duffy [or] Ernst & Young [had] ever before or since created reports of the kind at issue . . . ."[182]

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173. *See id.* at 202.

174. *See id.* "[I]t is uncontradicted that defendant requested the consumer report *after* plaintiff had announced his resignation . . . ." *Id.*

175. *See id.* The court also rejected the company's "legitimate business need" argument. *See id.* at 203. The company produced no evidence "that it requested plaintiff's consumer report 'in connection with' a business arrangement involving [plaintiff]." *Id.*

176. *See* 15 U.S.C. § 1681b; Rigo & Pritchard, *supra* note 17, at 4.

177. 15 U.S.C. § 1681a(f).

178. *See* Friend v. Ancillia Sys., Inc., 68 F. Supp. 2d 969 (N.D. Ill. 1999).

179. *See id.* at 971.

180. *See id.* at 974.

181. *See id.*

182. *Id.* The court also held that because the report "involved plaintiff's transactions or experiences as defendant's CFO" it was not a consumer report under the FCRA. *Id.*

C. How Do the FCRA Requirements Apply to Sexual Harassment Investigations?

The Federal Trade Commission enforces and interprets the FCRA.[183] In early 1999, Judi Vail, an employment attorney in Washington state, requested clarification from the FTC regarding whether the FCRA notice and other requirements apply in the sexual harassment investigation context.[184] While the FTC does not make definitive rulings about the FCRA, they do issue informal opinion letters that provide advice on interpretation.[185] The response to Vail's letter confirmed that the FCRA requirements probably apply to sexual harassment investigations.[186] "[I]t seems reasonably clear that the outside organizations utilized by employers to assist in their investigations of harassment claims 'assemble or evaluate' information."[187] Thus, outside investigators would be construed as consumer reporting agencies under the FCRA, and the resulting reports would qualify as either consumer reports or investigative consumer reports.[188]

D. What Does Liability Under FCRA Mean?

The FCRA authorizes the FTC to sue for violations of the Act, as well as impose fines up to $5000 per violation.[189] Employers that violate the FCRA are also civilly liable to the individual they investigate.[190] Employees can sue employers for any adverse employment action based on a consumer credit report if the employer fails to comply with FCRA requirements.[191] In addition, if the employee can prove the employer willfully or knowingly failed to comply, punitive damages are available.[192]

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183. *See* 15 U.S.C. § 1681s.
184. *See* Keller/Vail Letter, *supra* note 18.
185. *See* 16 C.F.R. pt. 600, App. § 621 (2000).
186. *See* Keller/Vail Letter, *supra* note 18.
187. *Id.*
188. *See id.*
189. *See* 15 U.S.C. §§ 1681q-1681s.
190. *See* Wiggins v. Philip Morris, Inc., 853 F. Supp. 470 (D.D.C. 1994) (acknowledging that the FCRA creates liability for report users who fail to comply with procedures); *see also* 15 U.S.C. §§ 1681n-1681o (codifying civil liability for non-compliance with the FCRA).
191. *See Philip Morris*, 853 F. Supp. at 476-77.
192. *See* 15 U.S.C. § 1681n(a)(2).

Courts differ on the correct definition of "willful" in interpreting the FCRA.[193]

Some courts hold that a criminal willfulness standard should apply.[194] Thus, the employer would only be liable for punitive damages if it knowingly or intentionally violated the FCRA.[195] Willfulness does not require malice or evil intent; rather, it depends on the employer's knowing disregard of the FCRA requirements.[196] Even when the employer discloses some of the required information, the court can find that the employer did not fully comply with the FCRA and thus is liable to the employee.[197]

A minority of courts has held that reckless disregard is the proper standard for determining willful violations.[198] For example, in *Matthews v. Government Employees Insurance Co.*, the court said this more exacting standard of reckless disregard was appropriate to uphold the FCRA's purpose.[199] The court also noted that courts adopted standards similar to those for defamation because the action under the FCRA involves "allegations of willful dissemination of false credit information."[200]

IV. ANALYSIS

A. Looking at the FCRA

The FTC's interpretation not only contravenes the purposes of Title VII (to eradicate discrimination), but does not further the purpose of the FCRA.[201] Congress enacted the FCRA to

193. *Compare* Wiggins v. Dist. Cablevision, Inc., 853 F. Supp. 484 (D.D.C. 1994) (applying a knowing or intentional standard), *with* Matthews v. Gov't Employees Ins. Co., 23 F. Supp. 2d 1160 (S.D. Cal. 1998) (applying reckless disregard standard).

194. *See* Davis v. Asset Serv., 46 F. Supp. 2d 503 (M.D. La. 1998) ("[W]illfulness [under the FCRA] is synonymous with the requirement of intent in criminal statutes."); Berman v. Parco, 986 F. Supp. 195 (S.D.N.Y. 1997).

195. *See Dist. Cablevision*, 853 F. Supp. at 490.

196. *See id.*

197. *See id.* at 489-90 (holding that plaintiff stated a cause of action when employer provided partial disclosure).

198. *See Matthews*, 23 F. Supp. 2d at 1164.

199. *See id.* "Congress did not intend to enable mass-users of credit reports to evade meaningful liability for repeated violations of their 'grave responsibilities' under the FCRA by sticking their heads in the sand and pleading ignorance of the law." *Id.*

200. *Id.*

201. *See* Letter from Max Zimny, Chairman, ABA Section of Labor and Employment Law, to Debra Valentine, FTC General Counsel (Aug. 16, 1999), *available at*

protect consumers from creditors' and employers' use of incorrect credit reports.[202] The goal, according to Congress, was to protect "the continued functioning of the banking system."[203] Restricting employers' use of outside investigators does nothing to assure public confidence in the credit reporting system.[204] Validity and accuracy of data in a credit report is not analogous to the validity and accuracy of a well-conducted workplace investigation.[205]

Harassment investigation reports are confidential—not only to protect the victim, but also to protect the accused.[206] The information gathered has potential to negatively impact employees, much like a negative credit report would.[207] However, if the investigator conducts a fair, impartial, and thorough investigation (which would include confronting the accused to allow him to respond to the charges), there is no need to implicate the FCRA to protect the employee.[208] Employers already have sufficient incentive to conduct fair and accurate investigations—to avoid litigation of tort or contract claims from the accused and to have solid evidence to establish an affirmative defense to a sexual harassment claim.[209]

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http://www.abanet.org/labor/fcrafinal.html [hereinafter ABA Section Letter]. "[T]he Opinion Letter is improperly expansive and, as a result, derogates other legal doctrines and policies of equal importance to employees and employers." *Id.*

202. *See supra* Part III.A.

203. *See* 15 U.S.C. § 1681(a)(1); ABA Section Letter, *supra* note 201. Additionally, Congress wanted to ensure reporting agencies acted with fairness and accuracy. *See* 15 U.S.C. § 1681(a)(4), (b).

204. *See* ABA Section Letter, *supra* note 201. "[T]here is no statutory basis for extending the reach of the FCRA to include investigations of employee misconduct unrelated to issues concerning 'credit worthiness, credit standing, [or] credit capacity.'" *Id.*

205. *See generally* ABA Section Letter, *supra* note 201. *But see* Pitney, Hardin, Kipp & Szuch LLP, *ABA Asks FTC To Revoke FCRA Application to Sexual Harassment Investigations*, 7 N.J. EMPL. L. LETTER (1999) (noting that the ABA's discussion avoided the issue of investigative consumer reports as addressed in the FCRA).

206. *See supra* Part I.C and Part II; *see also* 1999 EEOC GUIDANCE, *supra* note 12.

207. *See supra* Part II.

208. *See generally* ABA Section Letter, *supra* note 201; *supra* Part I.C (discussing effective investigations).

209. *See supra* Parts I-II; *see also* Kristine W. Samuels & Sandra Leung, *Harassment-Proofed Is Liability-Proofed*, NAT'L L.J., Nov. 1, 1999, at B9. "Liability and damage assessment for workplace harassment can rise or fall on the adequacy of the investigation." *Id.*

Critics have also challenged the dichotomy created by the FTC's interpretation of the FCRA.[210] If an employer hires someone to come into the workplace, interview employees, and review reports in the company's files, the company must comply with the FCRA.[211] On the other hand, if company employees use the same information, no prior notice to or permission from the accused is required.[212] "[T]he legislation is ill-served by distinguishing between an employer's internal investigation and an investigation that makes use of an experienced third-party investigator, where both investigations rely entirely on documents and information found in the workplace."[213] Following the district court's reasoning in *Friend*, investigations involving the accused's work activities might not be considered consumer reports even if outsiders conduct the investigation.[214]

B. Potential Challenges for Employers

Although a qualified privilege generally protects employers in defamation and privacy actions,[215] the courts have not yet addressed potential liability for workplace harassment investigations under the FCRA.[216] If courts follow the FTC's lead in interpreting the disclosure and notice requirements, employers may be forced to slow down the investigation process or to employ only in-house investigators.[217] Following such interpretation could even discourage thorough and fair

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210. *See* ABA Section Letter, *supra* note 201; *see also* Butler, *supra* note 159, at 394-95 (criticizing the FTC's interpretation of the FCRA as being too expansive).

211. *See* Keller/Vail Letter, *supra* note 18. "The relevant inquiry here is *not* whether the scope of the investigation goes beyond the employer's workforce or internal documents." *Id.* (emphasis added); *see also supra* Part III.B.

212. *See* Keller/Vail Letter, *supra* note 18.

213. David B. Fein & Suzanne E. Wachsstock, *FTC Opinion Undercuts Corporations' Ability To Unearth Workplace Problems*, LEGAL TIMES, Sept. 20, 1999, at S34. "[T]he act's purpose is to protect the integrity of information reflected in a consumer report...." *Id.*

214. *See supra* notes 178-82 and accompanying text.

215. *See supra* Part II.B.

216. To date only one case has mentioned the Keller/Vail letter. *See* Robinson v. Time Warner, Inc., 187 F.R.D. 144, 148 n.2 (S.D.N.Y. 1999) (involving discovery motions in a racial discrimination case). Time Warner hired an outside attorney to investigate the claims, *but* the investigation involved legal advice in response to the plaintiff's charges, not evaluations of plaintiff for purpose of taking adverse employment action. *See id.* Therefore, the FCRA did not apply. *See id.*

217. *See generally Workplace Harassment*, *supra* note 66.

investigations, and this could result in the unavailability of the affirmative defense in harassment investigations.[218]

Two of the biggest challenges for employers under the FTC interpretation involve confidentiality and timeliness.[219] Employees could be less likely to report harassment or to participate in an investigation if the accused will have access to the final report.[220] Additionally, the investigation could be delayed if the employer is unable to get permission from the accused.[221] "Not only will the time delays imposed by the FCRA impede effective sexual harassment investigations, they will allow what may be already volatile situations to continue or even escalate."[222]

C. Possible Solutions

The Society for Human Resource Management (SHRM), the U.S. Chamber of Commerce's National Chamber Litigation Center, and the ABA's Section of Labor and Employment Law have all urged the FTC to rescind its recent interpretation.[223] The SHRM is also organizing a coalition of business groups "to seek a legislative change so that the FCRA 'cannot be misapplied to employee misconduct situations such as sexual harassment.'"[224] However, before the FTC reconsiders the issue, Congress takes action, or the courts review the FCRA in employee investigation cases, what can employers do?

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218. *See* Basri, *supra* note 144, at 5.

219. *See supra* Parts I.B and I.C.

220. *See* Letter from Susan Meisinger, Senior Vice President, Society for Human Res. Mgmt., to Robert Pitofsky, FTC Chairman (June 23, 1999), *available at* http://www.shrm.org/government/regulatory/799ftc.htm [hereinafter Meisinger/Pitofsky Letter]; *see also* Samuels & Leung, *supra* note 209, at B9. "These disclosure requirements are often difficult to reconcile with the required 'reasonable and effective' investigation because retaliation fears may keep many critical witnesses in the background." *Id.*

221. *See* Meisinger/Pitofsky Letter, *supra* note 220.

222. *Id.*; *see also* Abell & Jackson, *supra* note 15, at 25 (discussing problems of memory and lost evidence). "[T]ardy investigations are more likely to be substantively insufficient than prompt ones." *Id.*

223. *See* Judy Greenwald, *Attorneys Critical of FTC Letter: Federal Rules May Clash Over Harassment Probes*, BUS. INS., July 26, 1999; Meisinger/Pitofsky Letter, *supra* note 220; ABA Section Letter, *supra* note 201.

224. Greenwald, *supra* note 223 (quoting Deanna Gelak, Director of Governmental Affairs, SHRM).

Until the courts or Congress address the issue, the FTC has provided some additional guidance for employers.[225] One alternative is to use an investigator who is not considered a "consumer reporting agency."[226] For instance, it has not been thoroughly tested whether attorneys who do not "regularly" compile workplace investigation reports would be considered consumer reporting agencies.[227] Another option, of course, would be to use internal investigators.[228]

Employers could also make the FCRA notice and authorization a part of the regular hiring process.[229] As long as the notice meets requirements relating to the potential use of such reports, the FTC interprets the statute to allow authorization at any time prior to accessing the report.[230] In certain cases, an employer might be able to ask *all* employees to sign FCRA authorizations at the beginning of an investigation.[231] While this broad authorization might delay the investigation, it could prevent any one employee from feeling singled out.[232] Because of the additional notification required, this option would only be a partial solution in investigations using investigative consumer reports.[233] Still, even in such cases, employers would have several days to begin the investigation process before the additional notification is required.[234]

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225. *See* FTC Staff Opinion Letter from David Medine, Associate Director, Division of Financial Practice, FTC, to Susan Meisinger, Senior Vice President, SHRM (Aug. 31, 1999), *available at* http://www.ftc.gov/os/statutes/fcra/meisinger.htm [hereinafter Medine/Meisinger Letter].

226. *See id.* at n.1.

227. Under the Sixth Circuit's interpretation of the FCRA in *Friend*, law firms arguably are not consumer reporting agencies in these situations. *See supra* notes 178-82 and accompanying text; *see also* Butler, *supra* note 159, at 394 (discussing the relationship between the FCRA and attorney-client privilege in attorney-run investigations).

228. *See supra* Part I.C.1.

229. *See* Medine/Meisinger Letter, *supra* note 225.

230. *See* FTC Opinion Letter from Ronald G. Isaac, FTC Counsel, to Michael C. Brisch (June 11, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/brisch.htm [hereinafter Isaac/Brisch Letter].

231. *See* Medine/Meisinger Letter, *supra* note 225.

232. *See id.*; Isaac/Brisch Letter, *supra* note 230.

233. Employees can sign a blanket authorization that allows the employer to request an investigative consumer report. *See* Isaac/Brisch Letter, *supra* note 230. However, the employer still must notify the employee of the investigation within three days of requesting an investigative consumer report. *See* 15 U.S.C. § 1681d(a)(1)(A) (Supp. 1999).

234. *See* 15 U.S.C. § 1681d.

The FCRA also requires disclosure of the reports if the information gathered leads the employer to take adverse action.[235] Such disclosure raises the issue of confidentiality and willingness of employees to participate in the investigation.[236] The FTC opinion letters make it clear that the employer may not redact information prior to providing a copy of the report to the individual.[237] The credit reporting agency may, however, provide a report for the employer that does not include names of witnesses.[238] While this may not be as helpful for the employer, it is one method to avoid disclosing that confidential information to the accused.[239]

CONCLUSION

The Supreme Court's attempt to clarify employer liability in sexual harassment has given employers further incentive to create effective policies and procedures to combat this growing problem.[240] While *Ellerth, Faragher*, and their progeny assist employers in establishing policies and procedures, they leave open exactly what is required of an employer.[241]

Although the availability of the affirmative defense may be limited because of the second prong of the *Faragher/Ellerth* test,[242] it is still critical for employers to effectively investigate all harassment claims.[243] The availability of the common interest or intracorporate communication privilege in defamation claims allows employers to take reasonable action in conducting and reporting on harassment investigations and recognizes the business needs of the company.[244] Management's need to make

235. *See id.* § 1681b(b)(3); *see also supra* notes 155-58 and accompanying text.
236. *See* Meisinger/Pitofsky Letter, *supra* note 220.
237. *See* Keller/Vail Letter, *supra* note 18.
238. *See* FTC Opinion Letter from William Haynes, FTC Attorney, to Douglas G. Hahn, President, HR Plus (July 8, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/hahn.htm [hereinafter Haynes/Hahn Letter]. This was also allowed under the previous version of the FCRA. *See id.* Thus, "Congress protected sources from disclosure at the same time that it broadened consumers' rights to gain access to information." *Id.*
239. *See id.*
240. *See supra* Part I. According to EEOC statistics, sexual harassment claims climbed from 6883 in 1991 to 15,618 in 1998. *See* 1999 EEOC GUIDANCE, *supra* note 12.
241. *See supra* Part I.B; *see also* Samuels & Leung, *supra* note 209, at B9.
242. *See supra* notes 34-35 and accompanying text.
243. *See supra* Part I.B.2.
244. *See supra* Part II.B.1.

business decisions based on available information is also recognized in the California Supreme Court's recent ruling on the role of the jury in wrongful termination claims.[245]

If the courts follow the FTC's lead and require employers to comply with the FCRA in completing investigations, employers could face problems in trying to combat and eradicate sexual harassment in the workplace.[246] If employers comply with the FCRA, it could result in delays initiating and completing the investigation.[247] Employees might also be less willing to participate in an investigation if the accused will have access to the resulting report.[248]

On the other hand, if the employer decides to circumvent the FCRA issue by completing investigations in-house, it could lead to ineffective investigations because of biased or untrained investigators.[249] Further, if the employer chooses to conduct the investigation without receiving authorization from the employee, the employer will face potential liability under the FCRA.[250]

Courts could also interpret the FCRA's requirements in light of the employer's need to conduct certain investigations promptly and confidentially, following the business needs model of defamation and wrongful termination cases.[251] Although that would make it difficult to uphold the protections of the FCRA, it would allow employers to better respond to allegations of harassment and thus better serve the purpose of Title VII and help end harassment in the workplace.[252] The question becomes one of which rights need more protection: the possible harasser's right to privacy and notice or the possible victim's (and other employees') right to a workplace free of harassment.

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245. *See supra* notes 88-90 and accompanying text.
246. *See supra* Part IV.B.
247. *See supra* Part IV.B.
248. *See supra* Part IV.B and note 220.
249. *See supra* Part I.C.1.
250. *See supra* Part III.D.
251. *See supra* Part II.B.
252. *See supra* Part IV.A; *see also* Basri, *supra* note 144. "Public policy encourages employers to make efforts to comply with the laws prohibiting discrimination." *Id.*